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43 **UNITED STATES DISTRICT COURT**

44 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

45 CISCO SYSTEMS, INC.,

46 Plaintiff,

47 vs.

48 ARISTA NETWORKS, INC.,

49 Defendant.

50 CASE NO. 5:14-cv-5344-BLF

51 **CISCO SYSTEMS, INC.'S REPLY IN
52 SUPPORT OF ITS MOTION TO
53 EXCLUDE EXPERT OPINION
54 TESTIMONY FROM DEFENDANT
55 ARISTA NETWORKS, INC.'S EXPERT
56 CATE M. ELSTEN**

57 **REDACTED VERSION**

58 Date: September 9, 2016
59 Time: 9:00 a.m.
60 Dep't: Courtroom 3, 5th Floor
61 Judge: Hon. Beth Labson Freeman

62 Date Filed: December 5, 2014

63 Trial Date: November 21, 2016

1 Plaintiff Cisco Systems, Inc. (“Cisco”) hereby respectfully submits this Reply in support of
 2 its Motion to Exclude Expert Opinions and Testimony From Defendant Arista Networks, Inc.’s
 3 (“Arista”) Expert Ms. Cate Elsten (Dkt. 429 (“Motion” or “Mot.”)) and in response to Arista’s
 4 Opposition thereto. Dkt. 468 (“Opposition” or “Opp.”).

5 **I. ARGUMENT**

6 **A. Ms. Elsten’s Disgorgement of Profits Opinions Should Be Excluded Because
 7 They Are Contrary To Controlling Legal Standards.**

8 Arista is wrong to argue (at 2) that “the legal standard Ms. Elsten recites is correct” and
 9 that her “disgorgement opinion does not depend on a finding that Cisco failed to establish a causal
 10 nexus.” *First*, Ms. Elsten neither recites nor applies the correct legal standard for disgorgement of
 11 *direct* profits, which Arista agrees are the type of profits at issue here. It is undisputed that “a
 12 ‘causal link’ between the infringement and the monetary remedy sought is a predicate to recovery
 13 of both actual damages and [disgorgement of] profits” under § 504(b). *Polar Bear Prods. v.*
 14 *Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004). However, Arista and Ms. Elsten ignore the fact
 15 that, to recover disgorgement of *direct* profits, a plaintiff may satisfy the “causal link” requirement
 16 by showing the “gross revenues *from the infringing product*.” *See Brocade Commc’ns Sys., Inc.*
 17 *v. A10 Networks, Inc.*, No. C 10-cv-3428-PSG, 2013 WL 831528, at *6 (N.D. Cal. Jan. 10, 2013)
 18 (emphasis added); *see also, e.g., On Davis v. The Gap, Inc.*, 246 F.3d 152, 160 (2d Cir. 2001)
 19 (“Thus, if a publisher published an anthology of poetry which contained a poem covered by the
 20 plaintiff’s copyright, we do not think the plaintiff’s statutory burden would be discharged by
 21 submitting the publisher’s gross revenue from its publication of hundreds of titles, including trade
 22 books, textbooks, cookbooks, etc. In our view, the owner’s burden would require evidence of the
 23 revenues realized from the sale of the anthology containing the infringing poem.”); *Taylor v.*
 24 *Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) (“[the plaintiff] could have made out a *prima facie*
 25 case for an award of infringer’s profits by showing [the defendant’s] gross revenues from the sale
 26 of the infringing maps”) (Posner, J.). Instead, citing portions of the *Polar Bear* opinion regarding
 27
 28

1 *indirect* profits,¹ Ms. Elsten incorrectly recites [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Notably, in its Opposition (at 3), Arista admits that, consistent with Judge Grewal's
 6 holding in *Brocade*, whether the feature at issue "drove consumer demand" is "not the right" test
 7 to determine whether the plaintiff satisfied its burden for *direct* profits. 2013 WL 831528, at *6.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Ex. 8, Elsten Rebuttal p. 75 (emphasis added). As *Garcia v. Coleman*, cited by Arista, makes
 15 plain, it is not the plaintiff's burden to show that the copyrighted work was "the only reason" or
 16 even "the main reason" why the defendant's product sold before the burden shifts to the defendant
 17 to deduct costs and apportion profits. 2009 WL 799393, at *4 (N.D. Cal. Mar. 24, 2009).

18 *Second*, contrary to Arista's claims, Ms. Elsten's disgorgement opinions are inextricably
 19 intertwined with her recitation and application of the incorrect legal standard. The fact that Ms.
 20 Elsten uses Cisco's gross revenue figure as the baseline for her calculations is beside the point,
 21 given that she purports to offer testimony critical of Cisco's expert, Dr. Chevalier, for failing to
 22 meet a burden that Cisco does not have – namely, to prove that sales of Arista's switches were
 23 driven by Arista's infringing CLI. Any testimony implying that Cisco must establish any more
 24 than the gross revenues from Arista's sales of infringing switches to recover *direct* profits would
 25 be contrary to the intent of § 504(b), would confuse the parties' respective burdens and would be

26

27 ¹ *Polar Bear* uses the term "causal link" to refer to the causal showing required for both actual
 28 damages and profits under § 504(b) and "causal nexus" solely in connection with its discussion of
 causation for *indirect* profits. 384 F.3d at 708-711.

1 highly prejudicial to Cisco. *See Bergt v. McDougal Littell*, 661 F. Supp. 2d 916, 927 (N.D. Ill.
2 2009); *Bonner v. Dawson*, 404 F.3d 290, 294 (4th Cir. 2005). Thus, Ms. Elsten’s disgorgement
3 opinions should be excluded.² *See FHFA v. Nomura Holding Am., Inc.*, 2015 WL 640875, at *3
4 (S.D.N.Y. Feb. 16, 2015) (finding Rule 702 and *Daubert* require exclusion of expert’s conclusions
5 based on incorrect interpretation of statute); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F.
6 Supp. 2d 794, 806 (N.D. Ill. 2005) (“Expert opinions that are contrary to law are inadmissible.
7 They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.”).

**B. Ms. Elsten's Apportionment Opinion [REDACTED]
Should Be Excluded Under Rule 702 Because It Is Arbitrary and Unreliable.**

Arista does not dispute that Ms. Elsten

Instead, Arista argues that Ms. Elsten’s opinions should be presented to the jury because Cisco’s criticisms go to weight, not to the reliability of the evidence or her methodology. To the contrary, as Judge Dyk recently held in *Stragent, LLC v. Intel Corp.*, equally valuing product features without an adequate basis is a **methodology** that lacks “the requisite indicia of expert **reliability**.” 2014 WL 4262440, at *4 (E.D. Tex. Marc. 6, 2014) (emphasis added).

While Arista devotes a lot of ink to the proposition that such a methodology may be admissible if it is possible to establish “foundational facts to support the assumption that the functions are of equal value,” *Finjan, Inc. v. Blue Coat Sys., Inc.*, 2015 WL 4272870, at *6 (N.D. Cal. July 14, 2015), Arista does not contend that Ms. Elsten has established or can establish such foundational facts. In fact, [REDACTED]

² To the extent that Ms. Elsten’s opinion regarding disgorgement of profits purports to incorporate by reference her entire opinion regarding lost profits, *see* Ex. 8, Elsten Rebuttal p. 74, it should be excluded, for any discussion of Cisco’s obligation to show causal nexus to the infringing CLI under a lost profits analysis is irrelevant to the legal standard for disgorgement of infringer’s profits, which Dr. Chevalier analyzed correctly, but Ms. Elsten did not.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]

7 See Ex. 9, Elsten 7/28/2016 Deposition Transcript (“Elsten Tr.”) at 213:2-214:2. [REDACTED]

8 [REDACTED]

9 apportionment opinions should be excluded. *See Good Tech. Corp. v. Mobileiron, Inc.*, 2015 WL
 10 4090431, at *7 (N.D. Cal. July 5, 2015) (excluding the apportionment opinion as “insufficient”
 11 where expert made “no investigation into whether any of the criteria is more important than
 12 others”); *Stragent*, 2014 WL 4262440, at *4; *Finjan*, 2015 WL 4272870, at *6.

13 Arista attempts to salvage Ms. Elsten’s disgorgement opinions by asserting (at 4, 6-8) that
 14 she considered a large number of data points and placed “no undue weight on any one source.”
 15 However, irrespective of how much evidence Ms. Elsten reviewed and considered, her report and
 16 testimony are clear that the basis [REDACTED]

17 [REDACTED] *See* Ex. 9, Elsten Tr. at 62:14-63:5;
 18 Ex. 8 Elsten Rebuttal at p. 83, 89. Whether or not Ms. Elsten considered **additional** evidence is
 19 irrelevant and does not make the evidence and methodology underlying [REDACTED]
 20 [REDACTED] any less arbitrary or more reliable.³ Under *Daubert*, “any scientifically required step that
 21 renders the expert’s analysis unreliable renders the testimony inadmissible.” *Abarca v. Franklin*
 22 *County Water Dist.*, 761 F. Supp. 2d 1007, 1072 (E.D. Cal. 2011).

23
 24 ³ Other unspecified materials referenced in Arista’s opposition (at 6) were expressly not
 25 relied upon by Ms. Elsten, *see* Ex. 8, Elsten Rebuttal p. 82-89, and, thus, cannot be used to bolster
 26 her unreliable opinions. *See Inline Connection Corp. v. AOL Time Warner, Inc.*, 470 F. Supp. 2d
 27 424, 433 (D. Del. 2007). As the alternative evidence and data points summarized in Table 13
 28 were similarly derived using unreliable methodologies, [REDACTED]

[REDACTED] *See Open Text S.A. v. Box, Inc.*, 2015 U.S. Dist. LEXIS 8783, at *11-12
 (N.D. Cal. Jan. 23, 2015) (excluding testimony of an expert’s reliance on non-comparable licenses
 to suggest a range of acceptable license rates).

1 **C. Ms. Elsten's Alternative Apportionment Data Points Should Be Excluded**
 2 **Under Rule 702 Because They Are Arbitrary And Unreliable.**

3 Each of the alternative apportionment data points in Table 13 was derived by Ms. Elsten
 4 using the same flawed methodology [REDACTED] Ex.
 5 8, Elsten Rebuttal p. 85. For each, [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] Ms. Elsten's methodology is unreliable and her
 9 resulting data points and opinions should be excluded. *See Good Tech.*, 2015 WL 4090431, at *7;
 10 *Stragent*, 2014 WL 4262440, at *4; *Finjan*, 2015 WL 4272870, at *9.

11 **D. Ms. Elsten Should Be Precluded From Presenting Opinions Regarding Non-**
 12 **Infringing Alternatives in Connection With Disgorgement of Profits.**

13 In its Opposition (at 9-10), Arista claims that Ms. Elsten does not intend to render an
 14 opinion regarding non-infringing alternatives in relation to her disgorgement of profits opinions.
 15 If this is true, Arista should not challenge an order precluding Ms. Elsten from testifying regarding
 16 purported non-infringing alternatives or the availability of alleged "Cisco-like" CLIs from other
 17 vendors in connection with her disgorgement opinions. Ms. Elsten's report regarding
 18 disgorgement of profits incorporated by reference her entire lost profits opinion, including
 19 testimony regarding non-infringing alternatives. As such, an order precluding her from relying on
 20 non-infringing alternatives for her disgorgement opinions is warranted here.

21 **E. Ms. Elsten Should Be Precluded From Testifying About a "De Facto Industry**
 22 **Standard" or "Industry Standard CLIs".**

23 In its Opposition (at 10), Arista does not deny that Ms. Elsten lacks the requisite expertise
 24 to testify that a "*de facto* industry standard" exists, arguing only Arista would be prejudiced if she
 25 could not. That is incorrect, as Ms. Elsten can provide testimony regarding all of her lost profit
 26 opinions without referring to an "industry standard," *e.g.*, by testifying about other vendors'
 27 supposed use of similar CLI to Cisco's. But she lacks the requisite knowledge or experience to
 28 opine that a "*de facto* industry standard" exists.

1
2 Dated: August 26 , 2016

Respectfully submitted,

3 /s/ Amy H. Candido

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SIGNATURE ATTESTATION

Pursuant to Civ. L.R. 5-1(i)(3), the undersigned hereby attests under penalty of perjury that concurrence in the filing of this document has been obtained from the signatory indicated by the "conformed" signature (/s/) of registered ECF User Amy H. Candido.

Dated: August 26, 2016

/s/ John M. Neukom
John M. Neukom